

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**GRACE PETRON**

Claimant

VS.

**LEE R. DOREY M.D., PA.**

Respondent

AND

**EMPLOYERS MUTUAL CASUALTY CO.**

Insurance Carrier

Docket No. **1,047,451**

**ORDER**

Claimant requests review of the June 24, 2010 preliminary hearing Order entered by Special Administrative Law Judge C. Stanley Nelson.

**ISSUES**

The claimant alleged she suffered repetitive injuries from August 28, 2002 and each day worked thereafter. Claimant alleged injuries to her knees, shoulders, bilateral upper extremities, back, hip and all affected parts. Claimant obtained an evaluation with Dr. George Flutter and respondent agreed to provide medical treatment for claimant with Dr. John Babb for claimant's right shoulder and right knee. And Dr. Alan Moskowitz was authorized to provide claimant treatment for her lumbar spine.

Claimant requested additional treatment for her bilateral upper extremities, specifically her left and right wrist, her left knee, bilateral feet and her cervical spine as well as her upper back. Respondent argued claimant had not complained of cervical spine or upper back pain when her discovery deposition was taken and that those complaints did not arise out of her work-related accidental injury.<sup>1</sup> Respondent further argued there was no evidence to support treatment for the bilateral wrists or feet.

The Special Administrative Law Judge (SALJ) found that claimant failed to sustain her burden of proof that she is entitled to medical compensation for treatment of her bilateral upper extremities, neck, upper back, cervical region as well as her bilateral feet.

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<sup>1</sup> The parties agreed the discovery deposition of Grace Petron taken November 9, 2009, was part of the evidentiary record for the preliminary hearing.

Claimant requests review and argues that she injured her bilateral upper extremities, cervical spine, upper back and bilateral feet as a result of her work activities for respondent.

Respondent argues the SALJ's Order should be affirmed.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Grace Petron began working as a surgical assistant for Dr. Lee Dorey on July 10, 2002, and her last day of work was June 22, 2009. Her job duties included pre-operative, intra-operative and post-operative care. In early 2005, claimant was given additional duties of an office manager. After October 2007, claimant requested that her duties be changed due to it being physically challenging for her to perform the surgical assistant duties.

In August 2002, claimant suffered an injury to both knees and her back while working with Dr. Dorey. She was treated by Dr. Dorey and it was covered by her own health insurance. Between August 29, 2002, and March 2003, claimant also sought medical treatment with a chiropractor. She continued to be treated by Dr. Dorey through 2004 due to continued pain in her back and groin as well as weakness in her left leg.

In order to perform her surgical assistant duties, claimant had to stand on a riser in order to reach the height of the table and also maintain a bent-over position.

Q. And as a result of performing these duties, and we're talking at least up and through the end of 2004, performing your duties as a surgical assistant would cause you more discomfort, more pain?

A. Yes, it aggravated my condition.

Q. And where would it aggravate your condition?

A. My legs, my back.

Q. And in what way would it aggravate your legs?

A. Would make my legs fatigue, my left leg would ache, the pain in my crotch would increase, the weakness of that left lower extremity would intensify.<sup>2</sup>

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<sup>2</sup> Petron Depo. at 22-23.

She testified that her pain would radiate down through her hip, buttocks and the back or front of both legs. Claimant testified she had another slip and fall possibly in December 2005 in which she wrenched her back again. She continued working as a surgical assistant which required her to stand and be in a flexed forward position for long periods of time. Claimant suffered another fall in June 2006 at her own house and then again in November 2006 at a friend's house. She had increased pain and discomfort in her back and left leg with each fall as well as her right shoulder.

Due to the fall in November 2006, claimant had surgery on her right knee for a posterior horn meniscal tear. Dr. Estivo performed the right knee surgery on January 30, 2007. Claimant suffered another fall and claimant then sought treatment with Dr. Jonathan Loewen. Surgery was again performed on claimant's right knee and then she was released by the doctor in September 2007. Dr. Dorey continues to see the claimant regarding her complaints relating to her back and both legs. She testified she still has pain in her knee while standing hyperextended for long periods of time. In August 2008, claimant suffered another fall due to a wet floor in the back office. She described the accident:

The linoleum on the floor was wet, I slid and tried to brace myself with my arms on a very wide hallway, it caused me to land on my right knee on the bumper between – that merges the carpet to the linoleum, the two uneven surfaces.<sup>3</sup>

She testified she also injured her shoulders in this accident. Claimant reported the accident to Dr. Dorey and then sought medical treatment with Dr. Thode at Same Day Care. She suffered increased pain in her back, both shoulders, and right knee. She continued to treat with Dr. Dorey and then was eventually referred back to Dr. Loewen.

Claimant described another injury that occurred in December 2008:

I was trying to get out of the passenger side of my car, I had that stabbing pain in the left side of the perineal area, jerking my left leg. I was trying to step out with my right leg when that happened, my right knee popped, gave way and I log rolled out of the car. I saw Dr. Dorey right after that.<sup>4</sup>

Another surgery was performed by Dr. Loewen on the claimant's right knee on June 26, 2009. Claimant last saw Dr. Loewen in October 2009 but has not been released from his care.

On July 2, 2009, Dr. Dorey referred claimant to Dr. Moskowitz for treatment. She received an epidural injection which was performed by Dr. Mueller.

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<sup>3</sup> *Id.* at 36.

<sup>4</sup> *Id.* at 41.

Q. As a result of your employment with Dr. Dorey, complaints to the low back, right leg, left leg, right shoulder, left shoulder, anything else?

A. Yes, there was a concern about carpal tunnel in my left hand.

Q. Who did you see as a result of these complaints.

A. Dr. Dorey referred me to Dr. Michael Munhall for an EMG and nerve conduction study.<sup>5</sup>

At the time of the preliminary hearing on April 30, 2010, claimant was receiving authorized medical treatment for her shoulders and right knee from Dr. Babb and Dr. Moskowitz was treating claimant's lower back. As previously noted, claimant was requesting authorization of treatment for her bilateral upper extremities, left knee, neck, upper back and bilateral feet. Respondent argues that based on claimant's testimony the left knee and left shoulder are the only additional body parts that could be considered for additional treatment.

Dr. George Flutter examined and evaluated claimant on November 2, 2009, at the request of her attorney. The doctor reviewed numerous medical records and took a history from claimant. The doctor performed a physical examination and diagnosed claimant as having bilateral knee pain, right knee internal derangement, right knee arthroscopy on three occasions, left knee contusion, right and left shoulder pain/impingement, right and left shoulder internal derangement, neck/upper back pain, middle back pain, back pain, lumbar discopathy most pronounced at L5-S1, and perineal pain. Dr. Flutter opined that there was a causal/contributory relationship between claimant's current condition and her work-related injury of August 28, 2002, and its sequelae. The doctor placed temporary restrictions on claimant of no lifting, carrying, pushing or pulling greater than 10 pounds occasionally and negligible weight frequently, avoid holding head and neck in awkward or extreme positions, limit overhead activities at or above shoulder level using each arm to an occasional basis, limit bending, stopping and twisting to an occasional basis, limit activities greater than 24 inches away from body using each arm to an occasional basis, limit squatting, kneeling, crawling and climbing to an occasional basis, and avoid prolonged sitting, standing and walking. Dr. Flutter recommended medications to treat her pain symptoms, physical therapy and home exercise program as well as an evaluation of claimant's right shoulder, right knee and back.

As previously noted, based upon Dr. Flutter's report, respondent authorized treatment for claimant's right shoulder, right knee and her back.

Dr. Flutter then amended his report on March 10, 2010, and opined in pertinent part:

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<sup>5</sup> *Id.* at 44.

It was an oversight to not include orthopedic evaluation and treatment of the left shoulder, the left knee and the neck/upper back. There were historical features and clinical findings that would support the necessity of appropriate evaluation and treatment of these body parts in addition to the body parts specifically mentioned in the IME report.

With respect to the symptoms affecting the left hand/wrist and both feet, there were no clinical findings to suggest specific pathology affecting these body parts. However, for completeness, it would be reasonable to obtain bilateral upper and lower extremity electrodiagnostic studies (including needle EMG of selected muscles of the arms and cervical paraspinals, and of the legs and lumbar paraspinals) in an effort to identify an etiology for these symptoms. These symptoms may be related to conditions affecting the cervical and lumbar portions of the spine.<sup>6</sup>

The SALJ denied claimant's requested additional treatment for her bilateral upper extremities, including her left hand or wrist, neck, upper back or her bilateral feet. The SALJ did authorize additional treatment to include both knees and shoulders.

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.<sup>7</sup> A claimant must establish that his personal injury was caused by an "accident arising out of and in the course of employment."<sup>8</sup> The phrase "arising out of" employment requires some causal connection between the injury and the employment.<sup>9</sup> A workers compensation claimant's testimony alone is sufficient evidence of the claimant's physical condition.<sup>10</sup>

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.<sup>11</sup>

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<sup>6</sup> *Id.*, Cl. Ex. 1.

<sup>7</sup> K.S.A. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

<sup>8</sup> K.S.A. 44-501(a).

<sup>9</sup> *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

<sup>10</sup> *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

<sup>11</sup> *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

The claimant had voiced complaints regarding her cervical spine and upper back at her evaluation by Dr. Fluter which occurred before her discovery deposition. She explained that she did not specifically mention those conditions at her discovery deposition because she assumed respondent's counsel had seen Dr. Fluter's report where she had mentioned those areas. And at her discovery deposition she just mentioned the areas that were causing her the most pain. Claimant's complaints were noted by Dr. Fluter and his amended report recommended treatment for her left shoulder, left knee, cervical spine and upper back. At this stage of the proceedings this report is uncontradicted. Moreover, the report relates claimant's conditions to her work related accidental injuries. Finally, Dr. Fluter's amended report recommends additional diagnostic testing to determine the etiology for claimant's left wrist and feet complaints.

Based upon the record compiled to date, including claimant's testimony and Dr. Fluter's reports, this Board Member finds claimant has met her burden of proof to establish she suffered accidental injury to her bilateral shoulders, cervical spine, upper back, lumbar spine and both knees. Consequently, she is entitled to medical treatment for those injuries. And based upon Dr. Fluter's recommendation, claimant is entitled to additional diagnostic testing to determine the etiology of her left wrist and bilateral foot complaints.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>12</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>13</sup>

**WHEREFORE**, it is the finding of this Board Member that the Order of Special Administrative Law Judge C. Stanley Nelson is modified in accordance with the foregoing.

**IT IS SO ORDERED.**

Dated this 30th day of September 2010.

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HONORABLE DAVID A. SHUFELT  
BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant  
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier  
C. Stanley Nelson, Special Administrative Law Judge

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<sup>12</sup> K.S.A. 44-534a.

<sup>13</sup> K.S.A. 2009 Supp. 44-555c(k).